No. 87-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD Y. SHINTAKU, AND ARNOLD B. GOLDEN,
Petitioners,

v.

DONALD D. COWAN,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Hawaii

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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ARGUMENT

Respondent Donald Cowan's opposition demonstrates all the more why certiorari should be granted to vindicate petitioners' absolute immunity from damages claims under 42 U.S.C. § 1983.

The judgment below raises substantial issues. Under the Supreme Court of Hawaii's judgment, Judge Shintaku and Dr. Golden must endure further burdensome litigation, stripped of federal absolute immunity defenses, upon charges of "a § 1983 conspiracy by them together with [respondent's criminal defense counsel] to have [respondent] assert, despite his ob-

jection, a mental irresponsibility defense in [a state] district court criminal case so that [respondent] could be subjected to a psychiatric examination by court-appointed doctors under HRS § 704-404."[1] It is undisputed that Dr. Golden's court-ordered report, which, if knowingly false, would subject Dr. Golden to prosecution,[2] was a basis for decisions by state judges Kanbara and Salz to order the § 704-404 study.[3] It is also undisputed that Judge Shintaku, who ordered Dr. Golden to prepare his report in a related civil action, had concurrent subject matter jurisdiction over respondent's criminal matter, and could have ordered the § 704-404 evaluation himself.[4]

It therefore cannot be disputed that the judgment below strips every judge in our state judicial system of the immunity this Court has reaffirmed "for more than a century,"[5] whenever, in a case over which a

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[1] *Cowan v. State*, No. 10256 (Haw. App. Sept. 22, 1986), Pet. App. 3, 43, *reconsideration denied* (Haw. App. Oct. 8, 1986), Pet. App. 45-47, *affirmed*, (Haw. June 23, 1987), Pet. App. 1-2, *reconsideration denied*, (Haw. July 10, 1987), Pet. App. 62-63.

[2] *See* Haw. Rev. Stat. § 710-1063 (1985).

[3] *See* Resp. Opp. at 9-10; *see also* Complaint ¶ 90, No. 71638 (Haw. Cir. filed June 7, 1982), Pet. App. 133, 137; Tr. of Oral Hearing, No. M-00567 (Haw. Dist. Mar. 25, 1980), Pet. App. 222; Motion for Mental Examination of Defendant, No. M-00567 (Haw. Dist. Apr. 8, 1980), Pet. App. 228, 230-31.

[4] *See* Haw. Rev. Stat. §§ 603-21.5(1), 603-21.9(1), 603-21.9(6); 704-404(1), Pet. App. 247, 249, 254; *see also id.* §§ 560-5:102, 560-5:312(a) (guardianship jurisdiction of the circuit courts), Pet. App. 261, 263; *id.* §§ 334-1, 334-59, 334-60 (mental health jurisdiction), Pet. App. 265-66, 268-70, 272.

[5] *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1986); *see also Forrester v. White*, 56 U.S.L.W. 4067, 4069 (U.S. Jan. 12, 1988); *Mitchell v. Forsyth*, 472 U.S. 515, 520-22 (1985); *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Supreme Court*

judge has jurisdiction, he or she lends advice, information, or counsel to another judge in the case. It also cannot be doubted that the decision below deprives court-appointed psychiatrists of their status as " 'integral parts of the judicial process.' "[6] Given that petitioners—taking respondent's claims as true—were enforcing Cowan's federal rights to "understand the nature and object of the proceedings against him,"[7] the lower courts' denial of federal immunity is not only clearly wrong on the law, but critically threatens judicial oversight of the criminal process in our State.

Respondent does not deny any of this, and raises no good reason why the judgment below should be permitted to stand.

I. Respondent's Allegations of Conspiracy Have No Bearing on Immunity Analysis under 42 U.S.C. 1983.

Respondent's basic argument why the decision below[8] should not be reviewed is the claim that it "is

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of Virginia v. Consumers Union, 446 U.S. 719, 734-35 (1980); *Ferri v. Ackerman*, 193, 202 (1979); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

[6] *Cleavinger*, 474 U.S. at 200 (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)); *see also Forrester v. White*, 56 U.S.L.W. at 4069 (absolute immunity for "advocates and witnesses" "free[s] the judicial process of harassment or intimidation"); *Malley v. Briggs*, 475 U.S. 335, 343 (1986) (absolute immunity protects all "central actors in the judicial process").

[7] *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[8] The vast part of the opposition brief relates solely to the sixteen claims whose dismissal was affirmed by the Intermediate Court of Appeals. *Compare* Resp. Opp. at 1-8, 12-30, *with* Pet. App. at 22-35. Respondent did not petition to the Supreme Court of Hawaii for review of those dismissals, and there is no power under 28 U.S.C. § 1257 to review them. Thus, despite Cowan's view, Resp. Opp. at 3-8, there is

pretty obvious" that "there existed a conspiracy among several persons to impose an insanity defense upon him." Resp. Opp. at 12. Yet this naked charge, even if true, does not overcome immunity. As the Ninth Circuit has ruled, "allegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence." *Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc) (citation omitted). Every other federal court of appeals to have recently addressed this issue agrees. *See Dorman v. Higgins,* 821 F.2d 133, 139 (2d Cir. 1987) (overruling *San Filippo v. United States Trust,* 737 F.2d 246, 254 (2d Cir. 1984), *cert. denied,* 470 U.S. 1035 (1985)); *Moses v. Parwatiker,* 813 F.2d 891, 893 (8th Cir.), *cert. denied,* 108 S. Ct. 108 (1987); *Dykes v. Hosemann,* 776 F.2d 942, 946 (11th Cir. 1985); *Holloway v. Walker,* 765 F.2d 517, 523 (5th Cir.), *cert. denied,* 474 U.S. 1037 (1985). This Court has

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no claim here respecting the validity of his prosecution for assaulting his former girlfriend. The courts below found as a matter of law that there was probable cause for the prosecution, Pet. App. 33. The issue here, as stated in our Petition, is whether absolute immunity bars respondent's federal claim that he was denied a right, ostensibly under *Faretta v. California,* 422 U.S. 806 (1975), to proceed in his criminal case as if he were completely sane. That is the claim left in state court.

Respondents' papers, however, vividly show why certiorari should be granted. Should review be denied, petitioners would have to expend substantial effort just to untangle for a state trial court respondent's briefs and pleadings. Even if we prevailed on other defenses, a failure to dispense the " 'strong medicine' " of absolute immunity, *Forrester v. White,* 56 U.S.L.W. at 4070 (U.S. Jan. 12, 1988), defeats the doctrine's purpose, that certain officials not "have to answer for [their] conduct in a civil damages action." *Mitchell v. Forsyth,* 472 U.S. at 525; *see Forrester,* 56 U.S.L.W. at 4069. Given the grave import of state judicial hesitancy to deal with criminal defendants who are incompetent to understand their criminal proceedings, certiorari is especially warranted in this case.

assumed the correctness of this reasoning. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). Respondent all but admits the only support for the judgment below is a theory that has no support in precedent, or logic.

II. The Judgment Below is Plainly in Conflict with this Court's Elaboration of the Absolute Immunity Doctrine and Otherwise Presents Substantial Issues Meriting Review.

Respondent's brief not only latches onto a "conspiracy exception" to absolute immunity for which there is no support. In the end, respondent practically concedes the predicate for petitioners' absolute immunity defenses to his federal claim.

Our petition rests on a straightforward argument. First, Judge Shintaku is absolutely immune because: (1) the act of which Cowan complains—assuring that respondent was competent to stand trial and that he acted with capacity at the time his alleged criminal act had occurred—was a "judicial" act; and (2) Judge Shintaku had jurisdiction to perform that act—to order psychiatric tests to determine Cowan's sanity. Petition at 21-25. That Judge Shintaku did not order the 704-404 exam personally cannot adversely affect the immunity analysis, for any role he might possibly have had as a state actor could not have been other than a "judicial" role, and even if Judge Shintaku acted, ex parte, to influence Judges Kanbara and Salz, such action did not deprive him of subject matter jurisdiction.

Although respondent asserts baldly that what Judge Shintaku is alleged to have done is "more in the line of what a prosecutor or private citizen does," Resp. Opp. at i, and thus immunity does not apply, granting

such a claim would require overruling *Stump v. Sparkman,* 435 U.S. 439 (1978), and substantially rewriting the recent decision in *Forrester v. White,* 56 U.S.L.W. 4067 (U.S. Jan. 12, 1988).

As *Forrester* reminds us, "the informal and ex parte nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character." *Id.* at 4069 (citing *Stump*). Admitting he was brought before Hawaii courts "on a proper . . . charge," Resp. Opp. at 12, Cowan concedes what was found below: probable cause backed the criminal action. Pet. App. 33. Although respondent claims Judge Shintaku communicated evidence from the civil case, over which Judge Shintaku presided, to judges in the criminal case, over which Judge Shintaku had jurisdiction, but did not preside, Resp. Opp. at 9, this charge, even if true, attacks the very sort of "informal and ex parte" activity that was protected by absolute immunity in *Stump.* Judge Shintaku clearly had subject matter jurisdiction over the criminal case, and even if Judge Kanbara's and Judge Salz's alleged receipt of information from Judge Shintaku would not have been valid under the rule that courts "may . . . take notice of proceeding in other courts, both within and without their judicial system," *Sapp v. Wong,* 3 Haw. App. 509, 512 n.3, 654 P.2d 883, 885 n.3 (1982), wrongful receipt of Dr. Golden's report would at most be one of the "*judicial* mistakes or wrongs . . . open to correction through ordinary mechanisms of review." *Forrester,* 56 U.S.L.W. at 4069 (emphasis added). *See State v. Shintaku,* 64 Haw. 307, 309, 640 P.2d 289, 292 (1982) (Supreme Court of Hawaii's all-writs ju-

risdiction); *see also* Haw. Rev. Stat. § 602-5(5) (1985) (state habeas).

Respondent concedes he has no ground to overcome this Court's test for judicial immunity, for he agrees "[d]ue process . . . eventually protected Respondent and he ultimately won the assault case." Resp. Opp. at 12. The inescapable conclusion, of course, is that Judge Shintaku, if he acted in the manner in which respondent alleges, was performing the core judicial function of assuring that criminal trials are free of constitutional error. *Engle v. Isaac,* 456 U.S. 107, 135 n.44 (1982). The evidence that Cowan claims was wrongfully communicated was *exculpatory.* Stripping the Judge of judicial immunity from suit under 42 U.S.C. § 1983 was manifestly wrong under *Stump* and *Forrester,* and merits this Court's review and reversal.

Respondent also takes nothing from Dr. Golden's claims. If Dr. Golden acted at Judge Shintaku's behest, he would take on the Judge's immunity "for the same conduct." *Westfall v. Erwin,* 56 U.S.L.W. 4087, 4089 (U.S. Jan. 12, 1988); *see* Petition at 26; *see also Coverdell v. Department of Social & Health Services,* 834 F.2d 758, 764-65 (9th Cir. 1987) (citing cases). But even if Dr. Golden were not so immune, *Briscoe v. LaHue,* 460 U.S. 325 (1983), would still apply. Petition at 26-27. The decision below is in sharp conflict with that of the Eighth Circuit that *Briscoe* immunity "extends beyond oral testimony" and covers "reports and recommendations," *Myers v. Morris,* 810 F.2d 1437, 1466 (8th Cir.), *cert. denied,* 108 S. Ct. 97 (1987); *see also Holt v. Casteneda,* 832 F.2d 123, 126 (9th Cir. 1987) (quoting *Myers* and other circuits applying *Briscoe* to immunize statements in

judicial proceedings). Respondent concedes Dr. Golden's report was " 'on file' " in the criminal case, Resp. Opp. at 10. That concession dictates immunity for claims arising out of the order for further tests by the 704-404 psychiatric panel. The conflicts between the judgment below and decisions of the courts of appeals, as well as with the precepts of this Court's "functional approach" to immunity, *Forrester*, 56 U.S.L.W. at 4068, clearly warrant review.[9]

CONCLUSION

For the reasons stated above and in our petition, the Court should grant the writ and summarily reverse the judgment below or grant plenary review.

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[9] Respondent suggests, but does not argue, Resp. Opp. at i, that the judgment rests on adequate state grounds. The suggestion is meritless. The intermediate court based its decision on a right to litigate "a § 1983 conspiracy [claim]," Pet. App. 43, and nothing in our supreme court's orders reinterprets this claim as arising under state law. *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983); Pet. App. at 1-2, 62-63.

Nor could petitioners be deemed to have waived any claims in their petition for review in the Supreme Court of Hawaii, Pet. App. 91, by asking the state court, on December 1, 1986, by letter, without filing a supplemental brief, to "consider and decide the merits of the issues raised by [our] petition for certiorari." Pet. App. 106. The order granting review below states: "Each party may, but need not, file a supplemental brief with respect to the issues raised in the application for certiorari." Pet. App. 53. Nothing in state law allows the state court to deem our immunity claim to be forfeited. Haw. R. App. P. 31(e)(9) states the court may, to narrow the scope of review on certiorari, and start the time to petition here, "limit the question on review" at the time review is granted. Pet. App. 282. The Supreme Court of Hawaii failed in any way to do this. Petitioners did just what 28 U.S.C. § 1257 commands, and raised their claims at every stage in state court. This Court has jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See also Hawthorn v. Lovorn*, 457 U.S. 255, 263 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)); *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958).

Because this Court has recently reaffirmed the grounds that compel reversal in *Forrester v. White,* 56 U.S.L.W. 4067 (U.S. Jan. 12, 1988), and the Supreme Court of Hawaii has not had a chance to act in light of this Court's reaffirmation of those precepts, the Court may wish to grant the petition, vacate the judgment below, and remand for further consideration in light of the decision in *Forrester v. White.* Such a remand would suggest to the court below that it should correct its judgment as to both petitioners under the "functional approach" that guides federal immunity analysis. *Id.* at 4068.

Respectfully submitted,

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